

National Casualty v. Coastal Development, No 03-57231

MAR 20 2006

KLEINFELD, Circuit Judge, concurring in part and dissenting in part:

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

I respectfully dissent with respect to National Casualty. The National Casualty policy is not ambiguous, the district court got it right, and its judgment should be affirmed.

The policy provides different coverages according to whether the claim is for “damages” or “non-monetary relief.” The claim in the underlying litigation is for a declaratory judgment and an injunction. Those are precisely what has long been understood as “non-monetary relief.” The distinction drawn by the policy would have no meaning if such traditional forms of “ancillary” relief as attorney’s fees and costs are treated as converting a claim for non-monetary relief into one for damages.

The policy definition of DAMAGES could not be more clear. First, the majority’s erroneous interpretation is the result of parsing the policy in the exact manner the California Supreme Court says not to. In *MacKinnon v. Truck*

Insurance Exchange,¹ the California Supreme Court states that it is “a basic fallacy,” that “the meaning of policy language is to be discovered by citing one of the dictionary meanings of the key words.”² Here, the majority, contrary to California law, uses the American Heritage College Dictionary to define “include,” and, discovering multiple definitions, it finds the policy provision ambiguous.

Second, “prejudgement interest” heads the list that the majority says can be read as a list of examples of monetary awards. But prejudgment interest is not a judgment itself, it is interest on a “judgment to receive damages.”³ Not only is prejudgment interest not a stand alone monetary award, it is not even a mandatory award under the California statute.⁴ Yet the majority states that it is “reasonable” to read a list headed by prejudgment interest as a list of “examples of monetary awards.” The list introduced by the word “including” in the National Policy definition of DAMAGES is subject to only one interpretation: a finite list of subordinate awards that will be covered subject to a monetary judgment, award, or

¹ *MacKinnon v. Truck Ins. Exch.*, 73 P.3d 1205 (Cal. 2003).

² *Id.* at 1214.

³ CAL. CIV. CODE § 3287.

⁴ *See McCalla v. Royal MacCabees Life Ins. Co.*, 369 F.3d 1128, 1131 (9th Cir. 2004).

settlement. As such, it is not ambiguous, and the majority's interpretation of this clause is untenable.

My view is merely the ordinary reading adopted in California law. In *Cutler-Orosi USD v. Tulare Co. Self Ins.*, the court held that “[a]ttorney fees . . . are inconsistent with the concept of ‘damages’ as the term is used in its ordinary and popular sense.”⁵ It contrasted attorney’s fees with damages because attorney’s fees do “not compensate the plaintiff for” his injury, but “reimburse[] him for a portion of the expenses he incurred in seeking . . . relief.”⁶ The court went on to say that interpreting the term “damages” so broadly would render limitation provisions in insurance policies, like the one in this case, meaningless.⁷

The facts in *Cutler-Orosi* are very similar to this case. In that case, the plaintiffs filed an equitable action under the Voting Rights Act that included a claim for statutory attorney’s fees under 42 U.S.C. § 1988, one of the statutes used by the plaintiffs in the underlying lawsuit against Coastal Development. The

⁵ *Cutler-Orosi USD v. Tulare Co. Self Ins.*, 37 Cal.Rptr.2d 106, 115 (Cal. App. 5 Dist. 1994).

⁶ *Id.* (citing *Hutto v. Finney*, 437 U.S. 678, 695, n.24 (1978)).

⁷ *Id.*

insurance policy in *Cutler-Orosi* stated that the insurer would pay “all sums which the Insured shall become obligated to pay as damages” to include “*all costs taxed against the Insured.*”⁸ The National Casualty policy says that it will pay the “monetary judgement, award or settlement . . . including . . . *all costs taxed against the INSURED.*” A California court found that the language in the former policy was not ambiguous and did not cover attorney’s fees.⁹ A California Insurance Treatise states that “[a]ttorney fee awards are not damages” and that suits seeking injunctive relief do not seek damages.¹⁰

We are required to follow California law. Doing so in this case, requires us to affirm as to National Casualty.

⁸ *Id.* at 109-10 (emphasis added).

⁹ *Id.* at 115.

¹⁰ 1 California Ins. Law Dictionary & Desk Ref. §§ A79, D1 (2005 ed.)